Supreme Court, U.S.
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No. 94-1838

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

OXY USA, INC.,

Petitioner,

v.

CONTINENTAL TREND RESOURCES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner OXY USA Inc. ("OXY") respectfully submits this supplemental brief in support of its petition for a writ of certiorari to bring to the Court's attention a recent opinion, *Pulla* v. *Amoco Oil Co.*, Nos. 94-4001, 95-1047, ___ F.3d ___, 1995 WL 747259 (8th Cir. Dec. 19, 1995). In *Pulla* an Eighth Circuit panel that included retired Justice Byron White, sitting by designation, held that a $500,000 punitive damage award imposed against Amoco Oil Company was "unreasonable and violates Amoco's substantive due process rights." 1995 WL 747259, at *8. Among other things, the Eighth Circuit in *Pulla* adopted a constitutional excessiveness standard based upon the "potential harm" analysis in *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), that is inconsistent with the standard applied by the Tenth Circuit in this case and thus further expands the conflict in the circuits on this issue.

The plaintiff in *Pulla*, a former Amoco employee, had recovered the $500,000 punitive damage award on a claim that his privacy had been invaded when his credit card records were searched by one of the plaintiff's coworkers to determine if the plaintiff had abused his sick leave. *See* 1995 WL 747259, at *1-*2. The district court had upheld the award, "reasoning that '[w]ere Amoco or others similarly situated to be undeterred from intruding on the privacy of employees' credit cards to check up on their use of sick leave or for any other purpose, the aggregate invasion of privacy into sensitive matters would be enormous indeed.'" *Id.* (quoting *Pulla* v. *Amoco Oil Co.*, 882 F. Supp. 836, 887 (S.D. Iowa 1994)).

In an opinion written by retired Justice White, the Eighth Circuit determined that the district court had "erred

by misconceiving the nature of potential harm" in reviewing the punitive damage award for excessiveness under the Due Process Clause. *Id.* According to the Eighth Circuit, "the potential damages must be evaluated in light of a defendant's actual conduct." *Id.* "Under this standard, the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in [the] defendant's actual conduct," and "a court may not justify the award of punitive damages in a particular case by overlooking the actual events and focusing on potential victims of similar *hypothetical* torts." *Id.* (emphasis in original).

In *Pulla,* "the district court focused on the hypothetical result of future such actions, and did not pinpoint any evidence connected to the actual search of [the employee's] credit card records." *Id.* The Eighth Circuit determined that the district court's "approach to analyzing punitive damages departed from *TXO* in that it did not require that the potential harm was likely to occur." *Id.* The Eighth Circuit concluded that the extreme ratio of punitive to actual damages (250,000 to 1) required a clear showing of the "likelihood and amount of potential damages," *id.* at *10, and that there was no such showing in that case.

The Eighth Circuit's analysis in *Pulla* conflicts with the reasoning of the Tenth Circuit in this case. Citing "evidence of 6,000 contracts" between OXY and other producers, Pet. App. 15a n.14, the Tenth Circuit justified the $30,000,000 punitive damage award imposed against OXY, in part, on "the *potential* widespread injury to large numbers of independent producers if OXY continued interfering with contracts." Pet. App. 17a (emphasis in original). There was no evidence that OXY engaged in any wrongdoing whatsoever concerning these other producers and the 6,000 contracts. Thus, in focusing on the

"hypothetical result" of OXY's future actions, the Tenth Circuit "did not pinpoint any evidence" connecting the theoretical potential harm to the actual events in this case, as required by *Pulla*. *Cf. Pulla*, 1995 WL 747259, at *9.

The Tenth Circuit also rationalized the punitive damage award as "an example to deter others from suppressing free enterprise," Pet. App. 15a, echoing the district court's assertion that the award was warranted because OXY's conduct "incrementally damages the United States in its present struggle to remain a global economic power," Pet. App. 51a. Yet, the Tenth Circuit made no attempt to explain how these harms to "free enterprise" and the American economy were "likely to occur" in light of OXY's *actual* conduct in this case, which resulted in $269,000 in actual damages, an amount 1/111th the size of the $30,000,000 punitive damage award. *Cf. Pulla*, 1995 WL 747259, at *9. Again, the Tenth Circuit's speculation regarding potential harm has no basis in the record and is flatly inconsistent with the standard for constitutional excessiveness review applied by the Eighth Circuit in *Pulla*. The Tenth Circuit simply did not and could not make a finding of the "likelihood and amount of potential damages" as required by *Pulla* to justify the very high ratio of punitive to actual damages in this case.

The decision below also conflicts with *Pulla* by emphasizing OXY's wealth as a justification for the size of the punitive damage award. The Eighth Circuit observed that "[w]hile a defendant's wealth may be taken into account in order to ensure that an award will adequately deter any future such conduct, a defendant's wealth cannot alone justify a large punitive damages award." *Id.* at *8 n.16. Here, however, the size of the punitive damage award can *only* be explained by OXY's status as a wealthy corporation. *See* Pet. 19-30. In fact, both the district court

and the Tenth Circuit stressed OXY's financial condition in rationalizing the amount of punitive damages awarded. *See* Pet. App. 20a-21a, 56a, 63a. According to the Tenth Circuit, the $30,000,000 punitive damage award "is not necessarily a shocking figure" when "examined from the perspective of what is necessary to punish a very wealthy corporation." *Id.* 21a. Indeed, the Tenth Circuit even justified the $30,000,000 award by relying—without any evidence—on the purported need to "deter . . . other similarly situated [wealthy corporations] from like behavior." *Id.* Such undue emphasis on the wealth of the defendant—and on other hypothetical wealthy defendants—is not permitted under the constitutional excessiveness standard applied by the Eighth Circuit in *Pulla*.

Pulla thus brings into sharp focus the conflict in the circuits discussed in OXY's petition and reply memorandum regarding the proper standards to be applied by federal courts in reviewing punitive damage awards for excessiveness, and further demonstrates the need for the Court to grant certiorari in this case.

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Respectfully submitted,

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